

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 649 of 1994

with

CRIMINAL APPEAL No 824 of 1994

For Approval and Signature:

Hon'ble MR.JUSTICE M.H.KADRI
and
Hon'ble MR.JUSTICE SHARAD D.DAVE

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1. Whether Reporters of Local Papers may be allowed : NO
to see the judgements?
 2. To be referred to the Reporter or not? : NO
 3. Whether Their Lordships wish to see the fair copy : NO
of the judgement?
 4. Whether this case involves a substantial question : NO
of law as to the interpretation of the Constitution
of India, 1950 of any Order made thereunder?
 5. Whether it is to be circulated to the Civil Judge? :

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BALWANT @ BALLU BABUSINH KAHAR & OTHERS

Versus

STATE OF GUJARAT

Appearance:

1. Criminal Appeal No. 649 of 1994
Mr. K.J. Shethna, with
MR JAYESH A DAVE for the appellant No.1
Mr. U.M. Panchal for the appellant No.2
MR Jadhav for the appellant No.3
Mr. A.J. Desai, APP for Respondent No. 1
2. Criminal Appeal No. 824 of 1994
Mr.A.J. Desai, APP for the appellant
Mr. K.J. Shethna, with

MR JAYESH A DAVE for the respondent No.1

Mr. U.M. Panchal for the respondent No.2

MR Jadhav for the respondent No.3

CORAM : MR.JUSTICE M.H.KADRI

and

MR.JUSTICE SHARAD D.DAVE

Date of decision: 15/07/2002

COMMON ORAL JUDGEMENT

(Per : MR.JUSTICE M.H.KADRI)

1. The appellant No.1, Balwant @ Ballu Babusinh Kahar (original accused No.4), the appellant No.2, Navnit @ Navo Gulabbhai Daruwala (original accused No.6) and the appellant No.3, Kamlesh Jamnadas Chhola (Kahar) (original accused No.17), by filing Criminal Appeal No.649 of 1994, have challenged the conviction and sentence imposed on them by the learned Additional Sessions Judge, Surat, by his judgment and order dated June 6, 1994, in Sessions Case No. 215 of 1992. By the impugned judgment and order dated June 6, 1994, the learned Additional Sessions Judge convicted the accused No.4, appellant No.1 herein, for the offence punishable under Section 302 and sentenced him to R.I. for life and fine of Rs.1500 in default S.I. for three months. The appellant No.2, original accused No.6, and the appellant No.3, original accused No.17 were each convicted for the offence under Section 324 of the Indian Penal Code for two years and fine of Rs.500 in default S.I. for one month.

2. Criminal Appeal No.824 of 1994 is filed by the State of Gujarat challenging the judgment and order dated June 6, 1994 passed by the learned Additional Sessions Judge, Surat, in Sessions Case No. 215 of 1992, acquitting the original accused Nos. 1 to 8, 10 to 13 and 17 and 18 of the charges under Sections 302, 147, 148, 324, 326, 427, 452, 120B of the Indian Penal Code and Section 135 of the Bombay Police Act. As common question of facts and law arise for our consideration, we propose to dispose of both these appeals by this common judgment and order.

3. The prosecution case is summarized hereinbelow. On October 13, 1991, at about 12.30 p.m. P.W.1, Prashantkumar Amrutlal, (complainant), along with five boys of his locality, i.e. Kharwawad, were playing cricket on the road near Mona Apartment. At that time,

some unknown boys from Machhiwad came there in an auto-rickshaw. The cricket ball struck the auto-rickshaw and, therefore, the persons occupying the auto-rickshaw picked up a quarrel with the complainant and the boys playing with him. There was a heated exchange of words between P.W.1 and the unknown persons occupying the auto-rickshaw and at the end the persons occupying the auto-rickshaw challenged the P.W.1 by saying that he should remain there and they would return soon. After ten minutes, in another auto-rickshaw, some ten persons came and encircled the complainant (P.W.1) but, due to the intervention of one Rajesh Ishwar and Sashikant Jamnadas of Kharwawad, the dispute was amicably settled and the persons, who came in the auto-rickshaw, returned to their locality.

4. It is the prosecution case that on October 14, 1991, at about 12 hrs. accused No.6 informed the complainant that one Bhagwan, Harish, etc were making plan to beat him. The complainant did not pay any attention to it as he was sure that nothing of that kind would happen as those persons were his co-students.

5. On October 16, 1991, at about 11.00 p.m., when the complainant was standing near Mona Apartment, in his locality known as Kharwawad, along with his friends, Rajesh Bachu, Arvind Mulchand and Munna Dahyabhai and they were preparing to go to see garba which was held due to Navratri festival, the appellant No.1, rickshaw driver, with whom he had previously a quarrel and one another person came to him on a scooter. The appellant No.1 asked the complainant that why he had quarreled with the rickshaw driver. The complainant informed him that the matter was already compromised. The appellant No.1 and his companions have tried to take him away forcibly on the scooter and, therefore, the complainant offered that the dispute be settled through Pravin Kahar. The appellant No.1 got annoyed by hearing the name of Pravin Kahar, and threatened him saying that he would soon be coming back. The complainant conveyed this incident to one Rajeshbhai who made arrangement to call the police in the locality. At about 11.30 p.m. the appellants Nos. 1 and 2, Mahesh Raman, Bhagwant Tal, Pravin Kali, Harish Mavji and other 20-25 boys from the locality of Machhiwad armed with lethal weapons like swords, knives, guptis, etc. came running at the said place where the complainant and his friends were standing. They were shouting and abusing. The mob rushed to the complainant and he being afraid of beating ran here and there in the mohalla and did not come in the hands of the mob. The mob became furious and started committing mischief with

the stationary vehicles parked in the mohalla and damaged the said vehicles and terrorized the residents of the locality. The mob also entered the house of the complainant and enquired about his whereabouts from his wife, P.W.25 Hansaben. The mob remained in the mohalla for about 15-20 minutes and was continuously committing mischief by stone pelting and breaking the glass of the auto-rickshaws, cars, etc. The complainant subsequently came to know that the mob had caused injuries to P.W.3 Nilesh Ratilal, Prakash Kanji, Shantilal Bhavanji, etc. who were the residents of his locality. The condition of Prakash Kanji and Nilesh Ratilal was serious and, therefore, they were taken to the Civil Hospital, Surat. On arrival of the police, the complainant lodged a First Information Report at 1 hrs. on October 17, 1991, before the Police Inspector, Athwalines Police Station, which came to be registered as CR No.I-464/91. P.W.33 P.I. Chowdhary of Athwalines Police Station, on coming to know that injured Pankaj Kanji succumbed to injuries, went to Civil Hospital and held inquest panchanama, and the body was sent for post-mortem. P.I. Chowdhary recorded statements of witnesses, prepared panchanama of place of incident and collected incriminating articles during the investigation. On October 21, 1991, P.I. Chowdhary arrested three accused who had presented themselves at the police station along with the weapons used by them. P.I. Chowdhary collected injury certificates of injured Ashok Purshottam and Nilesh Ratilal. On completion of investigation, P.I. Chowdhary submitted chargesheet against the appellants and other accused persons in the Court of learned Judicial Magistrate, First Class, Surat, wherein, it came to be registered as Criminal Case No.593 of 1992. As the offence under Section 302 of the Indian Penal Code is exclusively triable by the Court of Sessions, the learned JMFC has committed the case to the Sessions Court, Surat, where, it came to be numbered as Sessions Case No.215 of 1992.

6. Charge Exh.9 was framed against the accused persons for the offences punishable under Sections 147, 148, 149, read with Sections 120B, 302 read with Sections 149, 326, 324, read with Sections 149, 452, 427 of the Indian Penal Code and under Section 135 of the Bombay Police Act. The charge was read over and explained to the accused persons wherein they pleaded not guilty and claimed to be tried.

7. In order to prove the charge, the prosecution examined (1) P.W.1, Prashantkumar Amrutlal, Exh.35 (complainant), (2) PW.2 Bipinchandra Dahyabhai Sukhani, Exh.36, (3) PW.3 Ninesh Amrutlal Patel, Exh.37, (4) PW.4,

Nilesh Ratilal Sarang, Exh.39, (injured witness), (5) PW.5, Rasikbhai Bhanabhai Sarang, Exh.40, (6) PW 6, Ashokbhai Purshottam Talati, Exh.41 (injured witness), (7) PW.7, Jitendrakumar Balubhai Tolawala, Exh.42, (8) PW.8, Jitendra Shantilal Sukani, EXh.43, (9), PW. 9, Dharmesh Kishorbhai Mehta, Exh.44, (10) PW. 10, Deepak Govindbhai Patel, Exh.46, (11) PW.11, Ranjitbhai Ishwarbhai Khalasi, Exh,47, (12) PW 12, Bharatkuamr Vishrambhai Khalasi, Exh.48, (13) PW 13, Dr. Induben Nareshbhai Arora, Exh.49, (14) PW 14, Dr. Vijaykumar Ishwarlal Umarvanshi, Exh.51 (15) PW 15, Tarunbhai Navinchandra Pachhigar, Exh.53, (16) PW 16, Jayesh Karsishandas Modi, Exh.55, (17) PW 17, Ferozkhan Usufkhan Pathan, Exh.56, (18) PW 18, Dharmeshbhai Dahyabhai Sarang, Exh.57, (19) PW 19, Rameshbhai Naginbhai Rana, Exh.59, (20) PW 20, Navinchandra Maganlal Rana, Exh.60, (21) PW 21, Rameshchandra Babubhai Rana, Exh.61, (22) PW 22, Dr. B.V. Subramaniam, Exh.66, (23) PW 23, Abdul Rehman Aziz Shaikh, Exh.69, (24) PW 24, Asadulla Inamdar, Exh.70, (25) PW 25, Hansaben Prashantkumar, Exh.71, (wife of PW.1), (26) PW 26, Ashokbhai Chimanbhai Sukhani, Exh.72, (27) PW 27, Abdul Kadar Umar Garani, Exh.73, (28) PW 28, Tulsibhai Chhaganbhai Bhagat, Exh.74, (29) PW 29, Naginbhai Rana, Exh.75, (30) PW 30, Mohmad Arif Shaikh, Exh.76. (31) PW 31, Mohmad Hanif Rasulkhan, Exh. 77, (32) Police Jamadar R.K. Patil, Exh.83, and (33), Exh.33, P.I. K.M. Chowdhary, Exh.89. The prosecution produced documentary evidence such as post-mortem notes, injury certificates, panchanama of place of incident, First Information Report lodged by P.W 1, discovery and recovery panchanamas of muddamal weapons though not proved by the evidence of panch witness, report of FSL, arrest panchanama of accused persons, entries of police station diary at Exh.84, 85, 86, 87, and the complaint lodged by one Shardaben wife of Karsanbhai Ganchibhai at Exh.88.

8. After recording of the evidence of the prosecution, the learned Additional Sessions Judge, Surat, questioned the accused persons with regard to incriminating evidence found against them, and their statements came to be recorded under Section 313 of the Code of Criminal Procedure. The accused No.14 pleaded alibi that he was not present at the time of the incident at Surat and had gone to Mahabaleshwar. The learned Additional Sessions Judge did not record further statement of the accused no.14 as there was no evidence found against him involving him with the incident. Similarly, no evidence was found against the accused No.15. Hence, his further statement was also not recorded. The learned Additional Sessions Judge, on

appreciation of oral as well as documentary evidence and after hearing the arguments advanced by the learned Additional Public Prosecutor and the learned advocate for the accused persons, held that the prosecution has failed to prove that the accused persons had formed an unlawful assembly and were armed with deadly weapons with common object of causing murder of the complainant and other witnesses. The learned Additional Sessions Judge has further held that the prosecution had failed to prove that the object of unlawful assembly formed by the accused persons was to cause murder of deceased Pankaj and to cause injuries to other witnesses. The learned Additional Sessions Judge has held that the accused No.4 i.e. the present appellant No.1, had caused murder by inflicting blows with sword on the right chest of deceased Pankaj alias Prakash. The learned Additional Sessions Judge has further held that the prosecution had proved beyond doubt that the appellant No.2, Navnit Navo Gulabbhai Daruwala (original accused No.6), had caused grievous hurt to witness Ashok Purshottamdas Talati, by inflicting injury with sword and had also caused simple injuries to witness, Bipinchandra Dahyalal Sukhani.

9. The learned Additional Sessions Judge has further held that the appellant No.3, Kamlesh Jamnadas Chhola (Kahar) (original accused No.17) had caused grievous hurt to witness Neelesh Ratilal Sarang by inflicting blows with sword on his head, right hand as well as on right cheek. It was held by the learned Additional Sessions Judge that the prosecution has failed to prove that the members of unlawful assembly had committed trespass in the house of the complainant and had damaged the vehicles, namely, rickshaws, scooters, car, etc. to the tune of Rs.10,210/-. It was further held by the learned Additional Sessions Judge that no offence was proved to have been committed by the members of unlawful assembly under Section 135 of the Act. On the basis of above-referred to conclusion, the learned Additional Sessions Judge convicted the accused No.4, appellant No.1 herein, for the offence punishable under Section 302 and sentenced him to R.I. for life and fine of Rs.1500 in default S.I. for three months. The appellant No.2, original accused No.6, and the appellant No.3, original accused No.17 were each convicted for the offence under Section 324 of the Indian Penal Code for two years and fine of Rs.500 in default S.I. for one month. The accused nos. 4,6 and 17 have challenged their conviction and sentence imposed by the learned Additional Sessions Judge, by filing Criminal Appeal No.649 of 1994.

10. None of the accused persons was convicted for the offence under Sections 147, 149 read with Section 120B and also under Section 302 read with Section 149 and also under Section 324, 326, read with Section 149 of the Indian Penal Code. Therefore, the State of Gujarat has challenged the order of acquittal recorded against the original accused Nos. 1 to 8, 10 to 12, 17 and 18 by filing Criminal Appeal No.824 of 1994.

11. Learned advocate, Mr. K.J. Shethna, for appellant No.1 and learned advocate Mr. U.M. Panchal, for appellant No.2 and learned advocate Mr. Jadhav for the appellant No.3, and learned APP, Mr. A.J. Desai, have taken us through the entire record and proceedings of the appeals.

12. Learned advocate, Mr. K.J. Shethna, for the appellant No.1, has submitted that no charge under Section 302 of the Indian Penal Code simpliciter was framed against the appellant No.1 and, therefore, he could not have been convicted under Section 302 of the Indian Penal Code simpliciter and, therefore, his conviction is liable to be set aside. He has further submitted that the complainant, P.W.1, is not an eye-witness and he came to know through other witnesses that deceased Prakash alias Pankaj, Niles Ratilal, and Ashok Purshottam and Shantilal had sustained injuries by the sword blows given by the accused Nos.4, 6 and 17, i.e. the present appellants. It is submitted that the evidence of the complainant is hearsay and not admissible in the eye of law. It is submitted that the complaint was lodged after the panchanama of the place of incident was drawn and, therefore, no reliance could have been placed on the complaint lodged by the P.W.1, which was filed after long deliberation between the persons belonging to the locality of Kharwawad. The learned advocate for the appellant No.1 has submitted that nearly 400 to 500 persons had gathered near the place of the incident but no independent witnesses were examined and the witnesses examined were highly interested and their evidence was self-contradictory and totally inconsistent with the medical evidence and, therefore, the learned Additional Sessions Judge has erred in placing reliance on the uncorroborated testimony of the so-called eye-witnesses. The learned advocate for the appellant No.1 has further submitted that the story of the prosecution about the incident of 13.10.1991 and the accused persons having entered into the house of the P.W.1, is highly improbable as no persons, who had taken part in the incident of 13.10.1991 and who had entered into the house of P.W.1., were identified. It is

submitted that even P.W.25, who is the wife of P.W.1, had failed to identify any of the accused who had entered into the house enquiring whereabouts of P.W.1. The learned advocate for the appellant No.1 has submitted that the evidence of the so-called eye-witnesses is highly improbable and very weak and did not get any corroboration from circumstantial or medical evidence. The learned advocate for the appellant No.1 has further submitted that, though the accused no. 14 was not present at the place of the incident on 16.10.1991 and was falsely involved in the present case, recovery of gupti was shown from the accused No.14, which itself suggested that the whole case of the prosecution was got up and concocted. It is submitted that the medical evidence and also the report of the FSL do not support the evidence of the prosecution that the accused Nos. 4, 6 and 17 caused injuries to the deceased as well as the injured witnesses. It is submitted that no blood stain was found from the scene of offence and, therefore, it was highly doubtful whether such an incident occurred at the place as suggested by the witnesses and the complainant. The learned advocate for the appellant No.1 has submitted that the First Information Report was recorded late between 7 and 8 a.m. on 17.10.1991 and not at 1.20 a.m. as deposed by the witnesses. It is contended that the report sent to the Magistrate under Section 157 of the Code was late by more than 36 hours and the delay was not explained by the prosecution. The learned advocate has submitted that the Investigating Officer had recorded statement of Shantilal Bhagwan, who was injured in the incident, but the prosecution had not examined him at the trial. It is, therefore, submitted that benefit of doubt should be given to the appellant No.1, and his conviction and sentence recorded by the learned Additional Sessions Judge be quashed and set aside.

13. Learned advocate, Mr.U.M. Panchal, for the appellant No.2, has submitted that, according to the case of the prosecution, the appellant No.2 had caused injuries with sword on P.W.6, Ashok Purshottam Talati, whereas the said injured witness had deposed that he had sustained injuries with blows given by knife. It is submitted that, though the knife was alleged to have been recovered from the appellant No.2, no blood-stain was found on the recovered muddamal knife. Learned advocate, Mr.U.M. Panchal, for the appellant No.2 has further submitted that, as per the evidence of p.W.13, Dr. Induben Arora, who had examined injured P.W.6, Ashok, deposed that she cannot say positively whether the injuries noted by her on the body of P.W.6 can be caused

by inflicting blows with sword. Learned advocate, Mr.U.M. Panchal, for the appellant No.2 has further submitted that, as per the oral testimony of P.W.32, R.K. Patil, he had received a phone call prior to registering the First Information Report of the present case that there was a free fight (mara-mari) in Kharwawad-Nanpura. He has deposed that the said information was conveyed by police Jamadar, Shankerbhai Budhabhai, from the Civil Hospital. The said entry was produced by the witness which was admitted in evidence at Exh.87. According to the entry Exh.87, P.W.6, Ashok Purshottam of Kharwawad, was admitted in the Mission Hospital for the injuries sustained by him in the mara-mari and the said injury was sustained due to inflicting of blows with the knife. It is, therefore, submitted by Mr. Panchal that there was conflicting evidence with regard to weapons used for inflicting the injuries on P.W.6, Ashok Purshottam Talati, and, therefore, benefit of doubt should be given to the appellant No.2, and his conviction and sentence recorded by the learned Additional Sessions Judge be quashed and set aside.

14. Learned advocate, Mr. Jadhav, for the appellant No.3, has submitted that the evidence against the appellant No.3, original accused No.17, was very vague and no eye-witness has named him as assailant who had caused injuries on P.W.4, Nilesh Ratilal Sarang. It is submitted that, even according to the evidence of P.W.14, Dr. Umarvanshi, the injuries found on the person of P.W.4, Nilesh Ratilal, were not possible by inflicting blows with sword. It is submitted that, even in the First Information Report, no name of appellant No.3, original accused No.17, was mentioned and no witness had deposed that Nilesh had sustained injuries by blows of sword inflicted by the original accused No.17. Learned advocate, Mr. Jadhav, for the appellant No.3, has further submitted that the evidence of injured and other eye-witnesses was self-contradictory and, therefore, there were serious infirmities in the prosecution evidence. It is, therefore, submitted that the benefit of doubt should be given to the appellant No.3, and the conviction recorded of the appellant No.3 by the learned Additional Sessions Judge for the offence under Section 324 of the Indian Penal Code, be quashed and set aside.

15. Learned APP, Mr. A.J. Desai, has submitted that because of the incident which had taken place on October 13, 1991, the residents of the locality, Machhiwad, were eagerly waiting to take revenge on the complainant and his friends who were residing in the locality of

Kharwawad. It is submitted that the residents of locality Machhiwad had formed an unlawful assembly and were armed with lethal weapons and their common object was to cause injuries to the complainant and other witnesses of the locality of Kharwawad. Learned APP has further submitted that there was ample evidence produced by the prosecution to sustain the conviction of the appellants and, therefore, the conviction appeal filed by the appellants be dismissed.

16. The evidence of the complainant, P.W.1, Prashantkumar Amrutlal, is full of contradiction and omission. His uncorroborated testimony with regard to the incident which had taken place on October 13, 1991, is highly improbable and does not inspire any confidence. No names of the persons who had come to quarrel with the complainant on October 13, 1991 were disclosed by the complainant. No witnesses, due to whose intervention the dispute of 13.10.1991 was resolved, were examined. In view of these infirmities in the evidence, we are not inclined to believe the prosecution case that there was previous enmity between the complainant and the persons of locality of Machhiwad. With regard to the incident of 16.10.1991, the evidence of the complainant also suffers from serious infirmities. According to him, the accused No.4 had come to him and had threatened to kill him. Thereafter, he had conveyed the said incident to one Rajesh, who in turn had called the police. No such message conveyed to the police was produced by the prosecution nor the said Rajesh who called the police by conveying the message through telephone was examined. The evidence of the complainant is of highly doubtful and improbable. Even though he posed to be an eye-witness, in fact, he had not witnessed the incident and had run away and hidden himself near the compound of Saishav Hospital. The complainant had enmity and grudge against the appellant No.1 and, just to take revenge, he had falsely involved the original accused No.14 and the brothers of the appellant No.1 as the accused in the case even though he was not present at the time of the incident. The complainant, in cross examination, had admitted that, after collecting information from the persons gathered at the place of the incident, he had lodged the First Information Report. He also admitted that the police had already started preparing panchanama of the place of incident and, thereafter, he had lodged his complaint. From the evidence of P.W.1, the complainant, it becomes clear that even though he was not present and he had not witnessed the incident, he had tried to pose himself as eye-witness by collecting information from other sources. As per the case of the

prosecution, the complainant had lodged the First Information Report before P.I. Chowdhary at 1.20 hrs. on October 17, 1991. In this connection, it is worthwhile to refer to the oral testimony of P.W.7, Jitendrakumar Balubhai Tolawala. This witness, in cross examination, deposed that he had declared before the P.W.1 that at the time of the incident he was present. This declaration was made by him on the next day of the incident. He has deposed that, after he had declared before the complainant that he had witnessed the incident, the complainant had lodged his First Information Report at 7 a.m. The oral testimony of witness, Jitendrakumar, also creates doubt about lodging of the First Information Report at 1 a.m. or 1.20 a.m. on October 17, 1991. The copy of the First information Report was sent to the Magistrate after 36 hours, also, makes it doubtful that the First Information Report was lodged at around 1.00 a.m. or 1.20 a.m. on October 17, 1991.

17. With regard to testimony of the eye-witnesses, we find many contradictions in their evidence and those contradictions have been brought on record through the evidence of P.I. Chowdhary. The appellant No.1 had no motive to kill the deceased Pankaj alias Prakash. He was not present at the time when the previous incident took place on October 13, 1991. The oral testimony of the so-called eye-witnesses is not proved beyond doubt that the appellant No.1 had caused injuries by means of sword on the deceased Pankaj alias Prakash. No corroborative piece of evidence is found to have been collected by the Investigating Agency involving the appellant No.1 with the murder of the deceased Pankaj alias Prakash. Recovery and discovery panchanamas are not duly proved through the evidence of panchas. No blood-stain clothes were recovered from the person of appellant No.1.

18. P.W.22, Dr. Subramaniam, had performed autopsy on the dead body of Prakash. As per the evidence of P.W.22, Dr. Subramaniam, two injuries were found on the dead body of Prakash and they were as follows:

"(1) Stitched wound 6 cm long with two thread stiches over right hypochondriac region 7 cm above and 3 cm in the side to umbilicus as shown in picture

3 cm x 1 cm | 6 cm
 | 7 cm
 |
 3 cm * Umbilicus

(2) Stab Wound 0.5 cm above and lateral to injury No.1. Oblique 3 cm x 1 cm x cavity deep packing with

bandage. Seen present bandage soiled with blood, margins clean cut. Angles acute."

The witness was shown of the muddamal article, namely, sword. After looking to the edges of the sword, he deposed that the external injury No. 2 shown in column No.7 and external injury shown in column No.21 were not possible by the sword shown to him. With regard to injury No.1, which was stitched wound, Dr. Subramaniam deposed that it was a fresh wound. He could not depose positively whether the said stabbed wound was stitched at the time of giving treatment to the deceased. He deposed that no case paper of the treatment given to the deceased was with him. This shows that, before the post-mortem was performed, the deceased was given primary treatment at some hospital, but the prosecution thought it fit not to produce the case papers of the said treatment wherein stitches were taken of injury No.1. The late lodging of the First Information Report, infirmities in the evidence of the witnesses examined by the prosecution and the place of incident from which no blood-stain was found, create serious doubts about the genesis of the incident. In our view, the prosecution has tried to suppress the genesis of the incident. In view of the above inconsistencies of the prosecution evidence, we are of the view that the involvement of the appellant No.1 for causing murder of the deceased Prakash is highly doubtful and benefit of reasonable doubt should be given to him. Therefore, conviction and sentence imposed on the appellant No.1 under Section 302 of the Indian Penal Code deserves to be quashed and set aside.

19. The conviction of appellant No.2 under Section 324 for causing injuries to P.W.6, Ashok Purshottam, also deserves to be quashed and set aside for the following reasons. First in point of time, when a message was received from the Mission Hospital by Athwa Lines Police Station, it was conveyed by the constable present there that P.W.6 had sustained injuries by means of knife blows. Thereafter, in the First Information Report lodged by the P.W.1, the weapon was changed to sword. No sword was recovered from the appellant No.2 nor any blood-stain was found on the weapon alleged to have been used by the appellant No.2. As per the case of the prosecution, the appellant No.2 had also caused injuries by means of sword on P.W.2, Bipinchandra Dahyabhai, but the said witness was never treated in the hospital nor his medical case papers were produced in support of the case that he had sustained injuries by means of sword, blows of which were inflicted by the appellant No.2. The medical evidence of P.W.13, Dr. Induben Arora, also

contradicts the oral testimony of the injured witness that he had sustained injuries by sword used by the appellant No.2. As per the evidence of Dr. Induben, she cannot say positively whether the injuries found on the body of P.W.6 were possible by inflicting blows with sword. No corroborative piece of evidence was found against the appellant No.2 indicating him with causing of injuries by means of sword to P.W.6, Ashok Purshottam. The oral evidence of P.W.6 does not inspire confidence that, prior to the date of the incident, he knew the appellant No.2. The incident had taken place around 11.30 p.m. and there is no positive evidence that there was sufficient light to identify the appellant No.2 in the mob which consisted of more than 30 persons. No identification parade was held by the Investigating Agency before recording of the evidence so as to inspire confidence of the Court that the appellant No.2 was the same person who had caused injuries by sword to P.W.6. In view of the abovestated reasons, we are of the view that the prosecution had not led positive and concrete evidence to connect the appellant No.2 for causing injuries on P.W.6, Ashok Purshottam, and, therefore, he is entitled reasonable benefit of doubt. Hence, the conviction recorded and the sentence imposed on the appellant under Section 324 of the Indian Penal Code deserves to be quashed and set aside.

20. It is the case of the prosecution that the appellant No.3 had caused injuries by inflicting blows by sword on P.W.4, Nilesh Ratilal. It is pertinent to note that no other eye-witness, except the injured, has named accused No.17 as member of the unlawful assembly carrying sword in his hand. P.W.4, Nilesh Ratilal in his oral testimony deposed that the sword blows were inflicted by the appellant No.3. He identified appellant No.3 as person who had inflicted sword blows on him. It is pertinent to note that, in his examination in chief, he deposed that the appellant No.1 was also present in the mob. However, in cross examination, the witness admitted that he had not disclosed before the police that the appellant No.1 was present in the mob, but, he was deposing that fact for the first time in the Court. This shows what type of the witness P.W.4, Nilesh Ratilal, is. With regard to identity of appellant No.3, we are of the view that no identification parade was held by the Investigating Agency during the investigation to ensure to the Court that the same person who was identified in the Court had caused injuries on P.W.4, Nilesh Ratilal. For the injuries suffered, the witness was treated by P.W.14, Dr. Vijaykumar Umarvanshi, who was serving as Medical Officer in New Civil Hospital, Surat. As per the

injury certificate, Exh.52, P.W.4 had sustained the following injuries:

"H/O - Assault by somebodies over his face, head and right hand at about 12.00 midnight on 17.10.1991 by talwar.

O/E patient conscious - cooperative, well oriented

TPR (M) - pupils - BERL

L/E (1) CLW over right side of cheek,

6 x 1 x 1 cm, bone deep, oblique, red in colour

(2) CL@ over left parietal region

4 x 2 x 1 cm, oblique, red in colour

(3) CLW over dorsal aspect of lower third of right fore-arm 1 x 1 cm, oblique red in colour."

Looking to the injuries sustained by P.W.4, Nilesh Ratilal, P.W.14 Dr. Umarvanshi, had deposed that the injuries might not have been caused by sharp-cutting instruments like sword. In our view, the medical evidence does not support the case of the prosecution that the injuries sustained by P.W.4, Nilesh Ratilal, were caused by sharp-cutting instrument like sword. It is also pertinent to note that, in the injury certificate, Exh.52, while giving history before the Medical Officer, P.W.4, Nilesh Ratilal had only stated that he was assaulted by some body over his face, head and right hand at 12 midnight by talwar. No name of assailant was disclosed by the injured, P.W.4, Nilesh Ratilal. P.W.2, Bipinchandra Dahyabhai, who also claims to be an eye-witness, has not supported the case of P.W.4 that the appellant No.3 was present in the mob which had come from the locality of Machhiwad, and had launched attack on the persons of Kharwawad. P.W.5, Rasikbhai Bhanabhai Sarang, has also not supported the case of the prosecution that the appellant No.3 was armed with sword and was a member of the unlawful assembly. In view of these infirmities and improbabilities unsupported by any other corroborative evidence, we are of the view that the prosecution had not proved beyond reasonable doubt that the appellant No.3 had caused injuries on P.W.4 by inflicting injuries with sword. Therefore, in our view, benefit of doubt should be given to the appellant No.2, and the conviction recorded of the appellant No.3 by the learned Additional Sessions Judge for the offence under Section 324 of the Indian Penal Code, and the sentence imposed on him, deserves to be quashed and set aside.

21. State of Gujarat has filed Criminal Appeal No.824 of 1994 against the acquittal of the original accused Nos. 1 to 8, 10 to 13 and 17 and 18 of the charges under Sections 302, 147, 148, 324, 326, 427, 452, 120B of the Indian Penal Code and Section 135 of the Bombay Police Act. We are conscious of the fact that in dealing with an appeal where the Sessions Court has acquitted the respondents of the serious charges levelled against them, there should be very strong reasons to set aside the verdict of acquittal and to convict the respondents. There have, therefore, to be compelling reasons for us to come to the conclusion that the decision of the Sessions Court is clearly unsustainable both in fact and in law. If two views are possible then this Court would not, readily or ordinarily, reverse the findings of acquittal arrived at by the Sessions Court. On the other hand, if the only conclusion, which could be arrived at on the basis of the evidence on record, shows that there has been a serious miscarriage of justice, then, this Court would not hesitate in coming to a different conclusion. As observed earlier, the evidence of the complainant and other witnesses who alleged to have witnessed the incident is self-contradictory and against the medical evidence. According to the case of the prosecution, many persons had gathered at the place of incident, as there was celebration of Navratri Festival. Nearly 25 to 30 persons belonging to the locality of Machhiwad had launched an assault on the persons of the locality of Kharwawad. The motive behind launching of assault was not proved by the prosecution. There was very scanty evidence led by the prosecution with regard to prior incident of 13th October 1991. According to the prosecution case, a compromise was arrived at due to the intervention of some respectable persons of the locality and, therefore, there was no reason for the persons of Machhiwad locality to attack the complainant and other persons of his locality. The complainant himself had run away from the place of incident and had not witnessed the scene of incident. He had gathered information from other persons and, thereafter, had lodged the First Information Report. As per the evidence of the complainant and other eye-witnesses, the First Information Report was lodged after the police had arrived at and fixed the place of incident and drawn the panchanama of scene of offence. It shows that the First Information Report was lodged after long deliberation between the residents of locality of Kharwawad. With regard to the case of the prosecution that all the members of unlawful assembly had common object to kill the deceased Pankaj alias Prakash and to cause injuries on other witnesses, no such evidence was led by the

prosecution that the members who had formed unlawful assembly had common object to cause death of the deceased and to cause injuries on other witnesses. As discussed earlier, the evidence with regard to injuries sustained by the witnesses was self-contradictory and quite inconsistent with the medical evidence. If at all there was common object of unlawful assembly, then, that object would have been to kill the complainant and not the deceased Pankaj alias Prakash, because, as per the prosecution case, due to the previous incident, the persons of Machhiwad locality had a dispute with the complainant and not with the deceased Pankaj alias Prakash. It is the case of the prosecution that all the members of the unlawful assembly were armed with swords, knives, guptis, but the recovery of the said articles was not proved by the prosecution beyond reasonable doubt and no such articles were stained with blood. Presence of some of the members of the so-called unlawful assembly was also not proved by the witnesses beyond reasonable doubt. Even accused No.14, who was not present at the time of the incident in Surat, was involved with the incident which shows that the witnesses had tried to involve as many persons as possible of the locality of Machhiwad with this present incident. It is elementary that the evidence of an infirm witness does not become reliable merely because it has been corroborated by a number of witnesses of the same brand; for, evidence is to be weighed not counted. The learned Additional Sessions Judge has, after appreciation of evidence led by the prosecution, rightly acquitted the respondents of the acquittal appeal from the charges under Sections 302, 147, 148, 324, 326, 427, 452, 120B of the Indian Penal Code and Section 135 of the Bombay Police Act. When the presence of the respondents of the acquittal appeal was not established beyond reasonable doubt and when two views are possible in this appeal which is filed against the acquittal, no conviction can be recorded unless there are compelling reasons to interfere with the order of acquittal recorded by the learned Additional Sessions Judge. Suffice it to say that the learned Additional Sessions Judge has given cogent and convincing reasons for acquitting the respondents and the learned Additional Public Prosecutor has failed to dislodge the reasons given by the learned Additional Sessions Judge in order to convince us to take the view contrary to the one already taken by the learned Additional Sessions Judge. Having gone through the entire evidence of the witnesses coupled with the documentary evidence, we are of the view that the acquittal appeal filed by the State of Gujarat is meritless and deserves to be dismissed.

22. As a result of foregoing reasons, the conviction appeal, being Criminal Appeal No.649 of 1994, filed by the appellant No.1, Balwant @ Ballu Babusinh Kahar (original accused No.4), appellant No.2, Navnit @ Navo Gulabbhai Daruwala (original accused No.6) and appellant No.3, Kamlesh Jamnadas Chhola (Kahar) (original accused No.17), is allowed. The appellant No.1, Balwant @ Ballu Babusinh Kahar (original accused No.4), who was convicted for the offence under Section 302 of the Indian Penal Code, is acquitted of the said offence by giving the benefit of reasonable doubt. Consequently, the sentence imposed on him of R.I. for life and fine of Rs.1500 in default S.I. for three months is also quashed and set aside. The appellant No.1 is on bail and his bail bonds shall stand cancelled. The appellant No.2, Navnit @ Navo Gulabbhai Daruwala (original accused No.6) and the appellant No.3, Kamlesh Jamnadas Chhola (Kahar) (original accused No.17), who are convicted for the offence under Section 324 of the Indian Penal Code, are acquitted of the said offence by giving the benefit of reasonable doubt. Consequently, the sentence imposed on them of two years and fine of Rs.500 in default S.I. for one month is also quashed and set aside. The appellants Nos.2 and 3 are on bail and their bail bonds shall stand cancelled. Fine, if paid by the appellants, is ordered to be refunded to them. Muddamal be disposed of in terms of the directions given in the impugned judgment and order.

23. Criminal Appeal No.824 of 1994 filed by the State against the acquittal of the accused is dismissed.

July 15, 2002 (M.H. Kadri, J.)

(Sharad D. Dave)
(swamy)